ORIGINAL

(2)

NO. 89-61

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FILIBERTO OJEDA RIOS, ET AL., RESPONDENTS

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES L. SULTAN
Rankin & Sultan
One Commercial Wharf North
Boston, MA 02110
(617) 720-0011
Counsel to Ivonne Melendez Carrion

RICHARD A. REEVE
Assistant Federal Public Defender
234 Church Street
New Haven, CT 06510
(203) 240-3357
Counsel to Isaac Camacho Negron

DIANE POLAN
Levine, Polan, Curry & Doody
850 Grand Avenue
New Haven, CT 06511
(203) 777-4747
Counsel to Elias Castro Ramos

JOHN R. WILLIAMS
Williams and Wise
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Counsel to Hilton Fernandez Diamante

23 pp

QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in affirming the suppression of certain recorded fruits of electronic surveillance for violations of the immediate sealing requirement of 18 U.S.C. §2518(8)(a), where the government delayed sealing said tapes for at least eighty-two days due to its "disregard of the sensitive nature of the activities undertaken."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF THE CASE

In the course of a protracted investigation, the FBI conducted court-authorized electronic surveillance at various locations in Puerto Rico between April 27, 1984 and August 30, 1985. Gov. App. 18a. The initial Title III order, entered on April 27, 1984, authorized interception and recording of oral communications at the residence of Filiberto Ojeda Rios in Levittown, Puerto Rico and wiretapping of several public telephones across the street from the residence. Gov. App. 3a. That order was extended on two occasions. The final extension expired on July 23, 1984, fourteen days after the government terminated its electronic surveillance at Levittown. The Levittown tapes were judicially sealed on October 13, 1984, ninety-six days after the surveillance ceased and eighty-two days after the expiration of the final extension order. Gov. App. 4a.[1/]

On January 18, 1985, as the investigation continued, the government was authorized to wiretap two public telephones in Vega Baja, Puerto Rico. That Title III order expired by its terms on February 17, 1985. The government obtained a new wiretap order, based on a revised affidavit, on March 1, 1985. That order was extended twice, finally terminating on May 30, 1985. All the tapes derived from the Vega Baja telephone wiretaps were sealed on June 15, 1985, 118 days after the

---

1/ The government conducted electronic eavesdropping at several other sites during this interval. On July 27, 1984, the district court authorized surveillance at two locations, including Ojeda Rios' new residence in El Cortijo, Bayamon, Puerto Rico. Gov. App. 20a. No oral communications were ever intercepted from that location, though a wiretap of the residential telephone was carried out. Gov. App. 21a. In both the district court and the court of appeals, the government contended that the El Cortijo surveillance should be treated as an extension of the Levittown Title III orders, thus postponing the obligation to seal the tapes under 18 U.S.C. §2518(8)(a). Both courts rejected that argument, Gov. App. 68a-69a, 11a, and it has not been renewed in the government's petition for certiorari. Gov. Pet. at 18, n.13.

expiration of the January 18, 1985 order. Gov. App. 5a.[2/]

Following return of the indictment on August 23, 1985, defendants filed motions in the district court seeking to suppress all the recorded fruits of the government's widespread electronic surveillance on a variety of grounds, including violations of the judicial sealing requirement set forth at 18 U.S.C. §2518(8)(a). Def. C. A. App. 1, 10, 27. Evidentiary hearings on those motions spanned approximately ten months, concluding on June 28, 1988. On July 7, 1988, the district court issued a lengthy ruling (reprinted at Gov. App. 17a-96a) limited to the late sealing issue.[3/]

The district court ordered the suppression of the Levittown tapes as well as the fruits of the January 18, 1985 Vega Baja wiretap order due to the government's failure to comply with the statutory sealing requirement. The court accepted the government's explanation for tardy sealing with respect to all other Title III tapes generated during the sixteen months of electronic surveillance and declined to suppress them. Gov. App. 15a et seq. In the course of its decision, the district court did not resolve and explicitly declined to consider challenges raised by the defendants to the integrity of the suppressed Levittown tapes. Gov. App. 30a, n.3. A motion filed by the government for "clarification and reconsideration" of that footnote was denied. Def. C. A. App. 120.[4/]

2/ Both in the district court and the court of appeals, the government argued that the March 1, 1985 order should be deemed an extension of the January 18, 1985 order, thus postponing the government's obligation to seal the recorded fruits under the statute. That contention was rejected, Gov. App. 83a, 14a, and has not been renewed in the government's petition for certiorari. Gov. Pet. at 18, n.13.

3/ The district court subsequently addressed and rejected alternative grounds presented by the defendants to warrant suppression of all the government's Title III recordings. Def. C. A. App. 29-119. Those independent grounds for relief were raised, but not reached, in the court of appeals. Gov. App. 6a.

4/ In its petition for certiorari at 22, the government categorically declares, without citation to the record, "[T]here was no alteration of the tapes." The government also asserts (at 7) that the district court "[f]ound that the government had proved by clear and convincing evidence that the (continued...)

On the government's interlocutory appeal, the Court of Appeals for the Second Circuit affirmed the suppression of the Levittown and Vega Baja tapes. Agreeing with the district court that judicial sealing had been delayed for a minimum of eighty-two days, the court of appeals proceeded to consider whether the government had provided a "satisfactory explanation" pursuant to §2518(8)(a). The court of appeals specifically eschewed any automatic rule of exclusion based solely on the duration of sealing delay, Gov. App. 12a, and enumerated the relevant criteria:

> [t]he cause and length of the delay, the deliberateness of the statutory transgression, the integrity of the tapes, the tactical advantages or disadvantages accruing from the error, and other relevant factors in a given case must all be considered in answering the sole question which the statute requires to be asked, namely, whether there is "a satisfactory explanation for the absence" of timely judicial sealing.

Gov. App. 13a-14a.

Applying these factors to the record in this case, the court of appeals found the government's explanation for its delays in sealing unsatisfactory. The court concluded that the government's failure to seal the Levittown tapes in a timely manner "[r]esulted from a disregard of the sensitive nature of the activities undertaken." Gov. App. 12a. With respect to the late-sealed Vega Baja tapes, the court found no governmental explanation "[o]ther than an underlying cavalier conception that the sealing requirements are technical, rather than reflective of Congressional concerns about underlying constitutional

---

4/ (...continued)
tapes being admitted into evidence were in their original form and had not been tampered with." With respect to the tapes at issue here, which were ordered suppressed and thus not admitted into evidence, no such finding was made and serious questions remain respecting their authenticity and integrity. Gov. App. 6a.

requirements." Gov. App. 14a.[5/] The court pointed out that the district court had made no findings respecting the integrity of the suppressed tapes, noting:

> The appellees make the point that even if we were to reverse the district court's orders of suppression and to remand for further findings, serious questions of authenticity and integrity would remain for determination and independent grounds for suppression would be at issue on appeal. These include the Government's alleged use of a secret recording system, its alleged deliberate destruction of tapes containing original material, and its alleged practice of eavesdropping without recording.

Gov. App. 6a.

5/ These specific findings by the court of appeals appear to conflict directly with the unsupported assertion in the government's petition for certiorari (at 20) that: "They [delays in sealing] did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior." (emphasis supplied) According to the government, the sole cause of the sealing delay was "a perfectly reasonable misunderstanding" by the supervising attorney. Gov. Pet. at 22. The court of appeals ruled otherwise.

SUMMARY OF REASONS FOR DENYING THE PETITION

The government has petitioned this Court to grant certiorari in order to decide whether a delay in judicial sealing should result in suppression of tape-recordings under 18 U.S.C. §2518(8)(a) "even if the evidence establishes that the tapes have not been altered." Gov. Pet. at 11.[6/] Asserting that the approach employed by the Second Circuit "severely limit[s] the circumstances in which demonstrably unaltered tapes can be admitted into evidence where there has been a lengthy sealing delay," Gov. Pet. at 16, the government contends that no other court of appeals in the United States would have affirmed the suppression order entered here. Id. at 22. The government calls this case "an appropriate vehicle" for resolving what it characterizes as an "important" conflict among the courts of appeals. Id. at 11.

Contrary to the government's contention, this case does not present a conflict which merits this Court's attention. The various courts of appeals are in substantial accord in construing and applying the statutory sealing requirement. While some differences have emerged in analytical approach and emphasis, that diversity has rarely, if ever, had any practical consequences in the appellate courts. Indeed, during the two decades since the enactment of Title III, the various courts of appeals have affirmed or ordered the suppression of tapes for violations of the statutory sealing requirement in only one reported case other than this one.[7/] (pp. 8-11).

6/ At the outset, it should be noted that the government has framed the question in a manner that distorts the record and rulings below. Contrary to the government's suggestion, no findings were made in the lower courts as to the integrity of the tapes at issue here. See Gov. App. 6a; 30a, n.3.

7/ United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976) (8-12 month delays in sealing unexplained by government). Gigante and the instant case manifest the two most protracted sealing delays of all the reported decisions on the subject since the enactment of Title III.

The government's characterization of the Second Circuit as singularly aberrant in its interpretation of the sealing requirement is similarly flawed.[8/] Like the other courts of appeals, the Second Circuit has identified the integrity of late-sealed tapes as a relevant factor in determining whether suppression is appropriate. An application of its prescribed criteria to the particular circumstances presented by each case has led the Second Circuit to refuse to order suppression due to sealing delays in ten of its twelve reported decisions since the enactment of Title III. In any event, the Second Circuit has exercised its supervisory powers to promulgate specific sealing procedures applicable to all future cases, which should render academic its prior applications of §2518(8)(a). (pp. 11-13).

Even if there were a square conflict concerning the application of the statutory sealing requirement which could be deemed important, the record and the rulings below would make this case an inappropriate vehicle to resolve said conflict. First, since the courts below made no findings as to the integrity of the late-sealed tapes, this case does not present the Court with circumstances where tapes were suppressed due to sealing delays despite findings that no tampering had occurred. Indeed, the issue of tampering was hotly contested in the trial court. Substantial issues about the integrity and authenticity of the tapes remain unresolved. Gov. App. 6a. Second, defendants raised, and the court of appeals acknowledged, several independent grounds for affirmance of the suppression order, including the government's use of a secret recording system, its deliberate destruction of original recordings, and its practice of listening without recording. Id. Third, this is not a case where the government had any reasonable explanation for its

---

8/ In its petition at 22, the government declares that the sealing delays in this case would not have resulted in the suppression of evidence in any court of appeals other than the Second Circuit. Based upon the record in this case, that dramatic assertion is utterly without foundation and should be disregarded. It would be sheer speculation to guess at how any other court of appeals would respond to the unique circumstances of this case.

failure to comply with the statute. Rather, as the court of appeals found, the government committed a "dereliction" due to its "disregard of the sensitive nature of the activities undertaken" and "cavalier" approach to the sealing requirement. Gov. App. 12a, 14a. (pp. 14-15).

The government has failed to establish any "special and important reasons" for review, as required by this Court's rules. On the whole, prosecutors have had no difficulty complying with the simple, straightforward requirement of immediate sealing. Even where sealing has been delayed, the government has almost invariably managed to demonstrate a satisfactory explanation, thus fulfilling the terms of the statute. Neither the government's desire to relitigate the acceptability of its excuse for late sealing in this case nor its unhappiness with the express terms of §2518(8)(a) warrants the granting of certiorari. (pp. 15-17).

REASONS FOR DENYING THE PETITION

I. THE APPLICATION OF THE IMMEDIATE SEALING REQUIREMENT BY THE COURTS OF APPEALS HAS NOT PRODUCED ANY CONFLICT MERITING THIS COURT'S ATTENTION.

Notwithstanding the government's depiction of the courts of appeals as hopelessly divided in interpreting §2518(8)(a), a survey of all twenty-two reported appellate decisions respecting sealing delays[9/] reveals a vast area of common ground. To begin with, there is no dispute over the applicable language of the statute. Section 2518(8)(a) provides, in pertinent part, that Title III recordings shall be sealed under the direction of the authorizing judge "immediately upon the expiration of the period of the order, or extensions thereof." No appellate court has suggested that the term "immediately" as employed in the sealing statute should be accorded anything other than its customary meaning. The statute specifies:

> The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of any wire, oral or electronic communication or evidence derived therefrom under subsection (3) of §2517.

As the Court of Appeals for the First Circuit has observed: "This wording is crystal clear. It leaves no room to waffle ...." United States v. Mora, 821 F.2d 860, 866 (1st Cir. 1987).[10/]

Second, every court of appeals which has construed §2518(8)(a) has explicitly or implicitly treated a delay in sealing as equivalent to the absence of a seal in ascertaining whether the immediate sealing requirement has been violated and applying an appropriate remedy. E.g. United States v. Mora, 821 F.2d at 864-865 ("A tardy seal has no greater legal suasion than no seal at all."); United States v. Johnson, 696 F.2d 115, 124 (D.C. Cir. 1982); United States v. Diana, 605 F.2d 1307, 1311 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); United States v. Gigante, 538 F.2d 502, 506-507 (2nd Cir. 1976).[11/]

9/ Twelve of those decisions, including the instant case, emanate from the Second Circuit. United States v. Ojeda Rios, 875 F.2d 17 (2nd Cir. 1989) (82-118 day delays), cert. pending; United States v. Gallo, 863 F.2d 185 (2nd Cir. 1988) (5 day delay); United States v. Kusek, 844 F.2d 942 (2nd Cir. 1988) (8 day delay), cert. denied, ___ U.S. ___, 109 S.Ct. 157 (1988); United States v. Badalamenti, 794 F.2d 821 (2nd Cir. 1986) (7-13 day delays); United States v. Rodriguez, 786 F.2d 472 (2nd Cir. 1986) (14 day delay); United States v. Massino, 784 F.2d 153 (2nd Cir. 1986) (15 day delay); United States v. Ardito, 782 F.2d 358 (2nd Cir. 1986) (5 day delay), cert. denied, 475 U.S. 1141 (1986); United States v. McGrath, 622 F.2d 36 (2nd Cir. 1980) (3-8 day delays); United States v. Vazquez, 605 F.2d 1269 (2nd Cir. 1979) (7-13 day delays), cert. denied, 444 U.S. 981 (1979); United States v. Fury, 554 F.2d 522 (2nd Cir. 1977) (6 day delay), cert. denied, 433 U.S. 910 (1978); United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976) (8-12 month delays); United States v. Poeta, 455 F.2d 117 (2nd Cir. 1972) (13 day delay), cert. denied, 406 U.S. 948 (1972).

The ten cases decided by the other courts of appeals include: United States v. Mora, 821 F.2d 860 (1st Cir. 1987) (5-41 day delays); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983) (4 day delay); United States v. Johnson, 696 F.2d 115 (D.C. Cir. 1982) (5 day delay); United States v. Diana, 605 F.2d 1307 (4th Cir. 1979) (39 day delay), cert. denied, 444 U.S. 1102 (1980); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (9-38 day delays), cert. denied, 435 U.S. 923 (1978); United States v. Diadone, 558 F.2d 775 (5th Cir. 1977) (14 day delay), cert. denied, 433 U.S. 1064 (1978); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (57 day delay), cert. denied, 424 U.S. 927 (1976); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976) (5 week delay), cert. denied, 429 U.S. 855 (1976); United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975) (14 day delay), cert. denied, 423 U.S. 874 (1975); United States v. Falcone, 505 F.2d 478 (3rd Cir. 1974) (45 day delay), cert. denied, 420 U.S. 955 (1975).

10/ The legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 confirms that Congress meant what it said in enacting this statute. According to the report on the legislation issued by the Senate Committee on the Judiciary: "[T]he presence of the seal, noted above, is intended to be a prerequisite for use or disclosure under §2517(3) or (5) unless a satisfactory explanation can be made to the judge before whom the evidence is to be disclosed ...." S. Rep. No. 1097, 90th Cong., 2nd Sess. (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2194.

11/ In its petition at 12-14, the government argues for the first time, without citing any supporting precedent, that a delay in sealing should be treated differently than the absence of a seal under §2518(8)(a). This particular argument was not presented by the government either in the district court or the court of appeals, and it was not addressed by those courts. This Court ordinarily does not decide questions not presented below. E.g. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Youakim v. Miller, 425 U.S. 231, 234 (1976). It is noteworthy that this attempt to distinguish between the absence of judicial sealing and a delay in sealing under §2518(8)(a) is the very first argument made by the government in its petition for certiorari. Since no appellate court has held that a delay in sealing should be treated any differently than the absence of a seal, the government's belated attempt to create such a distinction and to (continued...)

Third, virtually every court which has addressed the statutory sealing provision has recognized that §2518(8)(a) contains its own exclusionary rule, independent from the general provision governing motions to suppress Title III recordings on other grounds which appears at 18 U.S.C. §2518(10). E.g. United States v. Mora, 821 F.2d at 866; United States v. Diana, 605 F.2d at 1312; United States v. Gigante, 538 F.2d at 506-507. But see United States v. Falcone, 505 F.2d 478, 483-484 (3rd Cir. 1974). Thus, this Court's decisions construing §2518(10)(a) are inapposite.

Finally, every court of appeals which has addressed the issue, including the Second Circuit, has identified the integrity of late-sealed recordings as a relevant factor in adjudicating a motion to suppress late-sealed tapes. E.g. United States v. McGrath, 622 F.2d 36, 42-43 (2nd Cir. 1980); United States v. Mora, 821 F.2d at 868 (requiring government to prove by clear and convincing evidence that late-sealed tapes have not been compromised); United States v. Diana, 605 F.2d at 1314 (inquiry into integrity of the tapes deemed "appropriate in determining whether a satisfactory explanation has been provided"); United States v. Johnson, 696 F.2d at 125 (evidence of integrity "will be an important component of the Government's satisfactory explanation" in most cases). In the instant case, the court of appeals agreed with the government that the integrity of the tapes, among other factors, is relevant to determining the adequacy of the government's explanation for delay. Gov. App. 12a.

Despite this substantial area of agreement, it is undeniable that the various courts of appeals have adopted diverse approaches and emphases in applying the immediate sealing requirement. The Fifth and Seventh Circuits have declined to order suppression of late-sealed tapes where no substantial

---

11/ (...continued)
suggest that it constitutes part of a conflict among the circuits should be rejected.

question about the integrity of the tapes has been raised and the purposes underlying the sealing requirement have been met. United States v. Angelini, 565 F.2d 469 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975).12/ United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975). The Third Circuit has applied §2518(10)(a) to a delay in sealing, reaching the conclusion that said subsection does not authorize suppression of late-sealed tapes. United States v. Falcone, 505 F.2d at 483-484.

The remaining courts of appeals which have addressed this subject have applied a panoply of criteria to determine whether or not the government's explanation for late-sealed tapes should be deemed "satisfactory." If not, the late-sealed tapes are subject to exclusion. United States v. Mora, 821 F.2d at 867-869; United States v. Johnson, 696 F.2d at 124-125. Outside the Second Circuit, there have been fewer than a dozen reported appellate decisions on this subject in the twenty years since the enactment of Title III. See n.8, supra. Whatever approach was employed in those cases, the result was invariably the same: none of the late-sealed tapes was ordered suppressed in any case.

Notwithstanding the government's mischaracterization of the Second Circuit's jurisprudence in this area11/, that court's

---

12/ In Angelini, which involved a 38-day delay, the court described the case as "a close one," noting that if Lawson had been decided prior to the relevant events, "[w]e might well take a different view ...." 565 F.2d at 472-473. In Lawson, defendants raised no challenge to the integrity of the tapes. 545 F.2d at 564.

11/ In a memorandum of law filed with the district court, the government described the Second Circuit's sealing decisions as "anomalous," "an aberration in the legal topography," and "draconian." Def. C. A. App. 168-171. Not surprisingly, those pejorative characterizations were omitted from the government's brief filed with the court of appeals, only to reappear in muted form in this Court. In its response to defendant's petition for certiorari in another late-sealing case, Gallagher v. United States (No. 88-7070), cert. pending, the government asserted that "[t]he Second Circuit has taken the most rigid view requiring virtually automatic suppression of unaltered tapes when the delay in sealing has been anything but minimal," citing that court's decision in the instant case. Gov. Br. in Gallagher at 9. As demonstrated herein, this hyperbole does not comport with reported caselaw.

rulings in sealing delay cases have generally been consistent with results in the other circuits. In all but two of its twelve decided cases, the Second Circuit has refused to order suppression of late-sealed tapes.[14/] As the Second Circuit has observed,

> [I]n most cases when (1) the government has advanced reasons for the delay, such as the need to perform administrative tasks relating to the tapes prior to sealing, (2) there is no basis for inferring that the government sought by means of the delay to gain a tactical advantage over the defendant or that it had any other improper motive, and (3) there has been no showing that there has been tampering with the tapes or that the defendant has suffered any other prejudice as a result of the delay, the government's explanation has been accepted as satisfactory.

United States v. Rodriguez, 786 F.2d 472, 477 (2nd Cir. 1986). Thus, in the Second Circuit, as elsewhere, the government generally has had little difficulty avoiding the suppression of Title III recordings in those cases where it has failed to seal such tapes "immediately," as required by statute.[15/]

Even if an important conflict did exist between the decisions of the Second Circuit and those of the other courts of appeals on this subject, such a putative conflict has been rendered academic by the Second Circuit's adoption of a mandatory

---

14/ Apart from the instant case, the only decision in which the Second Circuit has affirmed the suppression of late-sealed tapes was United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976), where the government offered no explanation for sealing delays eight-to-twelve months in duration. That case and this one exhibit the most protracted sealing delays addressed by any appellate court since the enactment of Title III.

15/ In the present case, the affirmance of the district court's suppression order by the court of appeals did not result from any peculiar construction of §2518(8)(a), but rather from an application of that statute to the unique circumstances of this case, including a protracted sealing delay caused by the government's disregard of the sensitive nature of electronic surveillance. Since no other court of appeals has ever been confronted with such a lengthy delay in sealing, it is unclear that any appellate court would have reversed the suppression order in this case based upon the evidentiary record adduced below.

sealing procedure to be followed when electronic surveillance tapes are not immediately sealed. United States v. Massino, 784 F.2d 153, 158-159 (2nd Cir. 1986). In Massino, the court, in the exercise of its supervisory powers, established a procedure designed to create a contemporaneous record and insure judicial oversight before delays in sealing become protracted. Since all of the district courts within the Second Circuit are presumably now adhering to that court's supervisory rule, there remains no reason for this Court to expend its limited resources addressing an insignificant difference between the Second Circuit and the other courts of appeals, which has been rendered substantially moot with respect to all electronic surveillance conducted after 1986.[16/]

In sum, contrary to the government's representations, the application of the statutory sealing requirement does not present an intolerable conflict crying out for immediate resolution. The adjudication of late-sealing claims in the appellate courts is necessarily an ad hoc endeavor dependent upon the peculiar circumstances of each case. The issue has not proven particularly important to the administration of criminal justice. The government has managed to present its tapes for timely judicial sealing in the overwhelming majority of cases. Indeed, delays in sealing Title III recordings have generated fewer than two dozen reported appellate decisions since the enactment of the statute in 1968. Even where violations of the immediate sealing requirement have resulted in litigation, suppression of late-sealed tapes has been upheld in only two egregious instances, including the instant case. Finally, the supervisory sealing procedure promulgated by the Second Circuit in Massino has

---

16/ In its petition, the government attacks the Massino procedures as "not needed." Gov. Pet. 18-19. This argument is irrelevant to the instant case since those procedures were not applied here, nor was it argued below. Significantly, the government describes the procedures outlined in Massino without making reference to the fact that those procedures were adopted in the exercise of the court's supervisory authority, rather than mandated by the court's interpretation of §2518(8)(a). Gov. Pet. 17.

effectively superceded that court's caselaw applying §2518(8)(a) with respect to all future Title III investigations.

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE STATUTORY SEALING REQUIREMENT.

The government's petition erroneously suggests that this case presents a clear legal issue for resolution by this Court. Indeed, even the Question Presented, as stated in the government's petition, does not accurately describe the issues addressed below. That question incorporates as a premise that the tapes at issue "are proved to be the unaltered originals." Gov. Pet. at (I). Yet, as noted above, no such findings were made in this case with respect to the suppressed, late-sealed tapes. Thus, the issue upon which the government seeks review is a hypothetical one, inapplicable to the record in this case. The absence of findings by either lower court on the issue of tape integrity renders this case particularly unsuitable for Supreme Court review.

A second factor which militates against review is the existence of several independent grounds to affirm the suppression order. These grounds, which were noted but not reviewed by the Second Circuit, include:

> the Government's alleged use of a secret recording system, its alleged deliberate destruction of tapes containing original material, and its alleged practice of eavesdropping without recording.

Gov. App. 6a. This Court has consistently held that any ground properly raised below may be urged as a basis for affirmance of the court of appeals' decision. E.g. Whitley v. Albers, 475 U.S. 312, 326 (1986). Thus, if this Court were to grant certiorari and reject the rationale of the ruling below, these other independent grounds for affirmance of the suppression order would be ripe for consideration.

Finally, the lack of any reasonable explanation for the egregious delays here further renders this case inappropriate for

review. The government's claim that the delays "did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior," Gov. Pet at 20, and stemmed from "a perfectly reasonable misunderstanding," Gov. Pet. at 22, was specifically rejected by the court of appeals, which found:

> [T]he failure to seal the Levittown tapes here resulted from a disregard of the sensitive nature of the activities undertaken. The danger here is, of course, that today's dereliction becomes tomorrow's conscious avoidance of the requirements of law. The privacy and other interests affected by the electronic surveillance statutes are sufficiently important, we believe, to hold the Government to a reasonably high standard of at least acquaintance with the requirements of law.

Gov. App. 12a.

III. THIS CASE DOES NOT MERIT DISCRETIONARY REVIEW UNDER THIS COURT'S RULES.

Rule 17 of this Court's rules provides that a petition for certiorari will be granted only when there are "special and important reasons" to do so. The government has utterly failed to satisfy that stringent requirement in the instant case. The area of agreement among the appellate courts in applying the statutory sealing requirement substantially overshadows the diversity which has emerged in their respective approaches to the issue. Those insignificant differences have had no measurable impact upon the administration of criminal justice. Moreover, in the Second Circuit, the field has been essentially preempted by the supervisory promulgation of a sealing procedure to be employed in all future cases. See United States v. Massino, 784 F.2d at 158-159.

Close scrutiny of the government's petition reveals that what the government really seeks here is judicial reconsideration of the Second Circuit's determination that the government's

explanation for the protracted sealing delays in this case was unsatisfactory. In the face of a contrary finding by the court of appeals, the government continues to insist that the sealing delays in this case "did not result from carelessness, failure to give appropriate priority to the sealing requirement, or other sanctionable behavior." Gov. Pet. at 20. Reconsideration of that fact-bound issue surely does not merit the attention of this Court. See Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

Based upon its petition, the government also apparently wants this Court to rewrite that portion of §2518(8)(a) which makes the presence of a timely judicial seal or a satisfactory explanation for its absence a "prerequisite" for the use of Title III recordings in a court of law. The government would effectively amend the statute to provide that late-sealed tapes should be admitted, even in the absence of a satisfactory explanation, if the government can demonstrate that they have not been tampered with during the period of delay. Gov. Pet. at 14. Given the virtual impossibility of detecting skillful electronic editing of tape-recordings, see United States v. Johnson, 696 F.2d at 124, the legislative decision to require immediate judicial sealing as a prophylactic rule to help insure the integrity of such recordings was entirely reasonable. The sealing requirement can be readily complied with by diligent prosecutors. It has been fifteen years since this Court admonished the government to maintain "strict adherence" to the provisions of Title III. United States v. Chavez, 416 U.S. 562, 580 (1974). In any event, the government's proposal to dilute the statute should properly be addressed to Congress, not to this Court.

A separate factor which counsels against granting review in this case is that any decision on the merits is unlikely to control the future course of this long-running criminal case. If the appellate decision stands, the government will presumably proceed to trial against the defendants using its other evidence, including hundreds of non-suppressed tapes. If review were

granted and the appellate decision reversed, the case would have to be remanded to the court of appeals for resolution of independent grounds for suppression raised in the district court. See Gov. App. 6a. Such a process would further delay the trial of this indictment, which was returned on August 23, 1985.17/

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

James L. Sultan
Rankin & Sultan
One Commercial Wharf North
Second Floor
Boston, MA 02110
(617) 720-0011
Counsel to Ivonne Melendez Carrion

Richard A. Reeve
Assistant Federal Public Defender
234 Church Street
New Haven, CT 06510
(203) 240-3357
Counsel to Isaac Camacho Negron

Diane Polan
Levine, Polan, Curry & Doody
850 Grand Avenue
New Haven, CT 06511
(203) 777-4747
Counsel to Elias Castro Ramos

John R. Williams
Williams and Wise
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Counsel to Hilton Fernandez Diamante

DATED: August 8, 1989

17/ All of these defendants were arrested four years ago. Seven were detained without bail for sixteen months. They all remain subject to onerous conditions of release.

RANKIN & SULTAN
ATTORNEYS AT LAW

CHARLES W. RANKIN
JAMES L. SULTAN

ONE COMMERCIAL WHARF NORTH
SECOND FLOOR
BOSTON, MASSACHUSETTS 02110
(617) 720-0011

FAX (617) 742-0701

August 8, 1989

Joseph F. Spaniol, Jr.
Clerk of the Supreme Court
of the United States
United States Supreme Court Building
Washington, DC 20543

Re: United States v. Filiberto Ojeda Rios, et al.
United States Supreme Court October Term 1989 No. 89-61

Dear Mr. Spaniol:

Enclosed for filing in the above-captioned matter please find the following:

1. Respondents' Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit;

2. Motion of Respondents Ivonne Melendez Carrion, Isaac Camacho Negron, Elias Castro Ramos, and Hilton Fernandez Diamante to Proceed In Forma Pauperis; and

3. Certificate of Service.

I am enclosing the original along with nine copies of these documents in accordance with the Court's rules respecting in forma pauperis filings.

I am also enclosing herewith for filing my Entry of Appearance as counsel of record to Ivonne Melendez Carrion in this matter. Thank you for your assistance.

Sincerely yours,

James L. Sultan

JLS:pcb

Enclosures

FEDERAL EXPRESS AIRBILL #8372448162

cc: Kenneth W. Starr, Solicitor General of the United States
Counsel for all co-respondents